IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

THE UNITED STATES OF AMERICA and HENRY A. WALLACE, Secretary of Agriculture	)	
PLAINTIFFS	)	IN EQUITY
v.	)	NO.
GREENWOOD DAIRY FARMS, INC., a Corporation	)	
DEFENDANT	)	

BRIEF OF PLAINTIFFS IN SUPPORT OF
APPLICATION FOR PRELIMINARY INJUNCTION

STATEMENT OF THE CASE

This cause is before the Court on the plaintiffs' application for a preliminary injunction as prayed for in the bill of complaint. The application for the preliminary injunction is based upon the sworn bill of complaint and the affidavit of E. W. Gaumnitz, Economic Adviser of the Dairy Section of the Agricultural Adjustment Administration. The case made by the bill of complaint may be briefly stated as follows:

On March 22, 1934, the Secretary of Agriculture, pursuant to the provisions of Section 8 (3) of the Agricultural Adjustment Act, issued the Indianapolis Milk License, which licensed every distributor of milk, including the defendant, in the Indianapolis Sales Area.

Because of the deliberate, repeated and defiant violations of the Indianapolis Milk License by the defendant, the Secretary of Agriculture revoked the license of the defendant, on August 2, 1934, after an administrative hearing held in accordance with law.

Notwithstanding the fact that its license has been revoked, the defendant is still openly conducting its business not only in contempt and in defiance of the order revoking its license but in violation of the terms and conditions of the Indianapolis Milk License and the Agricultural Adjustment Act. The action of the Secretary in revoking the license of the defendant was taken only after a full, careful and complete administrative hearing held in accordance with and pursuant to General Regulations of the Agricultural Adjustment Administration which were duly promulgated by the Secretary and approved by the President of the United States.

At this administrative hearing, the defendant corporation appeared by counsel, and was given full opportunity to cross-examine witnesses produced by the Government and to introduce evidence in its own behalf. No attempt was made by defendant's counsel to deny or disprove that it had committed the violations with which it was charged. The proceeding under which this administrative hearing was held was designed to give to the defendant the fairest possible kind of a trial. The Presiding Officer at the hearing, after having heard all of the evidence and having considered a written brief filed by defendant's counsel, recommended to the Secretary that the license of the defendant be revoked; and the Secretary with the full record before him made specific findings of fact holding the defendant guilty of willful and repeated violations of the License and ordered its license revoked. The verified bill of complaint further discloses that since the revocation of its license the defendant has willfully continued to distribute milk and cream in violation of the Secretary's order revoking its license and of the Indianapolis Milk License and of the Agricultural Adjustment Act.

The bill discloses that the conduct of the defendant in continuing to operate its business after its license has been revoked and without complying with the provisions of the Indianapolis Milk License, has had a seriously disrupting influence upon the stabilization of the Indianapolis Milk Market and has frustrated the effective operation of the Indianapolis License. Unless this court will enforce the law, i.e., the statute, the License and the order of revocation, by granting a preliminary injunction pending a final decision, the Indianapolis market will be thoroughly unstabilized and the Administration's program in the Indianapolis market will utterly fail. Moreover, the defendant's flagrant defiance of the law will seriously prejudice the Administration's program in the other milk markets of the large metropolitan centers throughout the nation. The detailed allegations of the bill conclusively demonstrate that unless the preliminary injunction prayed for is granted, the plaintiffs are without any effective means of enforcing the statute, the License and the order of revocation.

Thus the plaintiff's case consists of (1) the Agricultural Adjustment Act (2) the Indianapolis Milk License (3) the revocation of the defendant's license because of its undenied violations of the Milk License, and (4) the fact that the defendant is continuing to do business despite the revocation of its license. The Act, the Indianapolis License and the revocation of the defendant's license, are obviously incapable of being contradicted. The defendant will not deny that it committed willful violations of the provisions of the License which amply justified the Secretary in revoking its license. The continuance of the defendant in business is established by the verified bill of complaint and will not be denied by the defendant. The only conceivable issue which the defendant may raise is the constitutionality of the Agricultural Adjustment Act or of the application of the Indianapolis Milk License to its business. The bill of complaint makes out not merely a prima facie, but, apart from this issue, a conclusive case. The burden is upon the defendant to show the unconstitutionality of the Agricultural Adjustment Act and the Indianapolis Milk License, but we contend the the facts appearing from the bill of complaint and the affidavit of Mr. Gaumnitz affirmatively demon-

strate the constitutionality of the Act and the application of the Indianapolis License to the business of the defendant. It will be shown herein that the Act and the Milk License are an appropriate exercise of the Federal Power to regulate interstate commerce (a) because all of the milk produced in the Indianapolis Area is in the current of interstate commerce; (b) because the fixing of the minimum price which distributors must pay producers for their milk is an appropriate mode of regulating interstate commerce; and (c) because the purpose of the Act and the License in fixing the price to be paid producers for milk is to increase the national flow of interstate commerce. The second point in the brief establishes the proposition that the Indianapolis Milk License is a reasonable and appropriate regulation of the dairy industry and hence does not violate the due process clause of the Fifth Amendment because (a) the dairy industry, in the present economic emergency is vitally affected with a public interest and (b) the fixing of producers' prices is a reasonable means of effectuating the purposes of the Act. The final point of the brief will show that the bill of complaint and the affidavit make out a clear case for a preliminary injunction.

ARGUMENT

I

THE AGRICULTURAL ADJUSTMENT ACT AND THE INDIANAPOLIS MILK LICENSE ISSUED PURSUANT THERETO ARE A PROPER AND CONSTITUTIONAL EXERCISE OF THE FEDERAL POWER TO REGULATE INTERSTATE COMMERCE

A. ALL OF THE MILK PRODUCED IN THE INDIANAPOLIS SALES AREA IS IN THE CURRENT OF INTERSTATE COMMERCE; HENCE THE DEFENDANT'S BUSINESS MAY BE REGULATED BY THE FEDERAL GOVERNMENT WHETHER OR NOT THE DEFENDANT IS ITSELF ENGAGED IN INTERSTATE COMMERCE.

The defendant contends that the Federal Government is without power to regulate its business or any phase thereof for the reason that it is engaged in doing a wholly intrastate business; that because its purchases and sells all of its milk within the confines of the State of Indiana, its business is beyond the regulatory power of the Federal Government under the commerce clause of the constitution. We submit that the mere fact that the defendant's business is wholly intrastate, does not remove it from regulation and control by Congress under the commerce power.

The allegations of the verified bill of complaint and the statements contained in the affidavit of E. W. Gaumnitz filed in support thereof clearly establish that all of the milk in the Indianapolis Sales Area is in the current of interstate commerce, within the meaning of that term as used in the Agricultural Adjustment Act and in the decisions of the Supreme Court of the United States, and that under these circumstances the business of distributing milk in Indianapolis is clearly subject to Federal regulation whether or

not the particular distributor affected is himself engaged in transporting milk or its products across state lines.

Under this point of our brief we shall, therefore, first discuss the facts alleged in the bill of complaint and in the affidavit and demonstrate that these facts clearly establish that all of the milk in the Indianapolis Area is in the current of interstate commerce. We shall then show that under the decisions of the Supreme Court of the United States, the business of handling a commodity in such current is subject to regulation by the Federal Government.

The bill of complaint and the affidavit filed in support thereof establish that the market for milk is not local but national in extent. 58 percent of all of the milk produced in the United States is processed into butter, cheese and other dairy products. These products can be easily stored and readily transported. Commerce in them is nation-wide. So-called "manufacturing milk" which is used exclusively for processing into butter, cheese, evaporated milk and other milk products is produced, for the most part, in highly concentrated areas in the middle-west and in New York and California. Butter and other products manufactured therefrom are transported in interstate commerce out of the states of their production into every state in the Union. In addition, so-called "market milk" which is supplied to the urban centers of the country by producers located near the market is, in the areas of surplus production, very largely in excess of local needs. The portion of such market milk which is not locally consumed in fluid form is manufactured into butter and other dairy products. Large percentages of these products are exported from such urban centers and become a part of the vast interstate flow of butter, cheese, evaporated milk and other products processed from milk. Thus approximately 45 percent of the total amount of milk received in Indianapolis is not there consumed in fluid form but is processed into butter and other products. A large proportion of these manufactured products are shipped to distant markets outside of the State in the form of butter, powdered milk and evaporated milk. Cream, although more perishable and more costly to transport than butter, likewise moves extensively in interstate commerce. Even fragmentary figures indicate shipments of cream from the Indianapolis Sales Area to thirteen other states, most of them on the Eastern seaboard.

The interstate flow and the price of cream and manufactured products, in which form the bulk of all of the milk produced in the United States is consumed, and which move in interstate commerce from the states of their production to the states of their consumption, are vitally and directly affected by prevailing conditions in the local urban milk markets throughout the country. The direct effect of local conditions in fluid milk markets upon interstate commerce in dairy products has been accentuated during the present period of depression. The reduced consumptive demand for fluid milk resulting from the sharp decrease in the purchasing power of the inhabitants of the urban and industrial centers, unaccompanied by a decrease in milk production, has resulted in price-cutting, price-wars, and other destructive methods of competition among distributors in their struggle

to maintain sales in a rapidly contracting market. This competitive warfare among distributors has inevitably been reflected in drastic reductions in the price received by dairy farmers for market milk. The affidavit filed by the Government in this case clearly shows the effects of the depression upon the price paid for milk sold as whole milk in the Indianapolis market. Although pre-depression figures are not available, it appears that producers received $1.52 per hundredweight for milk sold as whole milk during the three months of 1934 immediately preceding issuance of the Indianapolis License, compared with a price of $1.91 per hundredweight received by them during the year 1931. Thus the price to Indianapolis producers was reduced by more than 20 percent. between 1931, after two years of depression, and 1934. In many instances, cut-throat competition among distributors has resulted in cutting the price to the producer even below that justified by the prevailing supply and demand situation.

These practices which have prevailed in the local milk markets throughout the country have immediately and directly affected the national price for butter and other dairy products which move in interstate commerce. Faced with a condition which made the production of milk for sale in fluid form in urban markets unprofitable, farmers supplying markets where the foregoing competitive conditions prevail, tend to turn from the production of market milk to the production of manufacturing milk, for processing into butter and other products where production costs (due to the absence of health requirements) and transportation charges are lower. The increased supply of manufactured products in the current of interstate commerce resulting from this shift in production tends to depress the price of butter throughout the country with a resultant decrease in the nation-wide price paid to farmers for manufacturing milk. The reduction in the price of butter and other dairy products, has in turn reacted further to reduce the price for market milk in urban centers.

The charts contained in the Government's affidavit graphically demonstrate the close relationship which exists in the price of manufactured dairy products in all markets in the country, such price differing from market to market only by differentials in transportation costs. They further demonstrate the close correlation between the price of fluid milk in local markets and the national price for manufactured dairy products. These price relationships clearly indicate that the problem of price stabilization and maintenance for milk and dairy products is a national one which can be dealt with only by a uniform and nation-wide program. Such a program is now being executed by the Secretary of Agriculture under the Agricultural Adjustment Act. Licenses for milk similar to the Indianapolis License are now in effect in over forty of the important urban milk markets in the country. Additional Licenses are being issued by the Secretary in the effectuation of this national program.

Under circumstances less clear than these, the Supreme Court of the United States has sanctioned Federal regulation of intrastate activity upon the grounds that such regulation is required to remove burdens which threaten interstate commerce. One of the conspicuous

instances of the exercise of such authority by Congress, which was sustained by the Court, is found in Chicago Board of Trade v. Olsen, 262 U.S. 1. Congress had enacted the Grain Futures Act which regulated transactions in grain upon the Boards of Trade of the country. Certain of the transactions subjected to Federal regulation by the Act, although intrastate in form, involved actual interstate movements of grain. These regulations were sustained upon the theory that the transactions regulated were indispensable incidents to the continued flow of grain from the West to the East and hence subject to Congressional regulation upon the authority of Stafford v. Wallace, 258 U.S. 495, discussed hereafter.

But the principal regulation provided for in the Grain Futures Act, and the one chiefly attacked in the Olsen case, was the regulation of trading in grain for future delivery. Such purchases and sales for future delivery rarely result in the transfer or delivery of the actual commodity. Not only are such transactions intrastate in form, but they involve no physical movement of the commodity whatsoever. Purchases for future delivery are, in the vast majority of cases, offset by sales before the delivery date arrives and vice versa, so that no physical movement of commodities is involved, even incidentally, in the transaction. The Court recognizes this fact, saying:

> "The question under this Act is somewhat different in form and detail from that in the Stafford case, but the result must be the same. It is not the sales and deliveries of the actual grain which are the chief subject of the supervision of federal agency by Congress in the Grain Futures Act * * *. It is the contracts of sales of grains for future delivery, most of which do not result in actual delivery, but are settled by offsetting them with other contracts of the same kind, or by what is called 'ringing'."

Nevertheless the Court sustained the regulation of future sales under the Grain Futures Act. The Court found that such sales had in the past, and might in the future, influence the price paid for cash grain which actually moves in interstate commerce. Congress had found in the Act that the manipulation of the price of grain futures worked to the detriment of producers, consumers, shippers and legitimate dealers engaged in interstate commerce in grain. The Court conceded that the curve of grain futures prices did not parallel the curve of cash grain prices. It pointed out that the price of grain futures and the price of cash grain were not dependent upon the same factors. It concluded, however, that speculative transactions in grain futures from time to time exerted a vicious influence upon and produced abnormal fluctuations in the price of cash grain which actually moves in interstate commerce. Based upon this finding, and although the influence of futures prices upon cash grain was held to be not constant but only occasional, the Court held that grain futures transactions were subject to regulation. In reaching this conclusion, the Court said, Page 40:

> "The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it. By reason and authority, therefore, in determining the validity of this act, we are prevented from questioning the conclusion of Congress that maniuplation of the market for futures on the Chicago Board of Trade may, and from time to time does, directly burden and obstruct commerce between the States in grain, and that it recurs and is a constantly possible danger. For this reason, Congress has the power to provide the appropriate means adopted in this Act by which this abuse may be restrained and avoided." (Italics ours).

The futures transactions regulated in the Olsen case resulted in only a negligible movement of grain. The effect of futures transactions upon grain prices was not constant, but occurred only at intervals. In the case at bar, as we have shown, there is a substantial interstate movement of dairy products, from both the Indianapolis Sales Area, and the other local fluid milk markets throughout the country which are being regulated by Licenses under the Agricultural Adjustment Act. In addition, as we have likewise shown, there is a close and constant correlation between the price of milk in fluid milk markets and the price of dairy products which move in interstate commerce. Thus both the actual interstate movement and the effect of intrastate transactions upon interstate commerce are greater and more direct and immediate in the instant case than in the Olsen case. A fortiori, the power of the Federal Government to regulate local transactions, sustained in the Olsen case, may properly and constitutionally be exercised in the regulation of fluid milk in the Indianapolis Sales Area.

A similar case is United States v. Patten, 226 U.S. 525 (1913) involving an indictment under the Sherman Anti-Trust Act for conspiring to corner the cotton market by dealing in cotton futures. The Circuit Court of Appeals sustained a demurrer to the indictment on the ground, among others, that the members of the conspiracy were not engaged in interstate commerce. The Supreme Court treated this fact as immaterial and discussed the interstate nature of the trade in cotton and held that since the conspiracy did impede and burden interstate commerce in cotton, it might be forbidden by Congress in the exercise of its power to regulate interstate commerce.

> "Bearing in mind that such was the nature, object and scope of the conspiracy, we regard it as altogether plain that by its necessary operation, it would directly and materially impede and burden the due course of trade and commerce among the States and therefore inflict upon the public the injuries which the Anti-Trust Act is made to prevent."

In Stafford v. Wallace, 258 U.S. 495 (1922) the Supreme Court sustained the constitutionality of the Packers and Stockyards Act which regulated, among other things, the business of commission men and of livestock dealers in the stockyards, against the contention that the business of such dealers was purely intrastate in character. The Court again recognized the power of Congress under the Commerce Clause to regulate a business which directly affects and burdens interstate commerce, although it is itself intrastate in character. The Court said at page 521:

> "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce, is within the regulatory power of Congress under the Commerce Clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This Court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of a subject to interstate commerce and its effect upon it are clearly non-existent." (Underscoring ours)

The proposition that the Commerce Clause gives Congress the right to regulate purely intrastate conduct which burdens and affects interstate commerce is strikingly illustrated by the well-known labor cases arising under the Sherman Anti-Trust Act.

Thus in Loewe v. Lawlor, 208 U.S. 274 in which a hat manufacturer was permitted to recover damages against members of a union of hat makers who induced concerns throughout the country not to purchase plaintiff's hats, in order to compel the plaintiff to unionize its factory, the Court squarely rejected the contention that since the defendants were not themselves engaged in interstate commerce their conduct could not be regulated under an Act in exercise of the power given by the Commerce Clause, and said at page 301:

> "Nor can the act in question be held inapplicable because the defendants were not themselves engaged in interstate commerce."

And in United Mine Workers v. Coronado Co., 259 U.S. 344 (1922) involving an action for damages against striking coal miners for conspiring to restrain interstate commerce in coal by preventing the plaintiff from mining its coal with non-union miners, the Supreme Court reiterated the proposition that an Act passed under the Commerce Clause might constitutionally regulate conduct, itself intrastate in character, which affects and interferes with interstate commerce. The Court said at page 407:

> ,"Coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. In Hammer v. Dagenhart, 247 U.S. 251, 272, we said: 'The making of goods and the mining of coal are not commerce, nor does the fact that these things are

> to be afterwards shipped or used in interstate commerce, make their production a part thereof. Delaware, Lackawanna & Western R. R. Co. v. Yurkonis, 238 U.S. 439.' Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce. We have had occasion to consider the principles governing the validity of congressional restraint of such indirect obstructions to interstate commerce in Swift & Co. v. United States, 196 U.S. 375: United States v. Patten, 226 U.S. 525; United States v. Ferger, 250 U.S. 199; Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R.R.Co., 257 U.S. 563; and Stafford v. Wallace, 258 U.S. 495. It is clear from these cases that if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint." (Underscoring ours).

In the second Coronado Case, Coronado Co. v. United Mine Workers, 268 U.S. 295 (1925) the Court sustained a recovery under the Sherman Anti-Trust Act by the coal company against the striking miners although it had clearly stated in the first Coronado case that the miners were not engaged in interstate commerce.

Other decisions of the Supreme Court sustaining the application of the Anti-Trust laws to intrastate activities are, Bedford v. Stonecutters Association, 274 U.S. 37 (1927) and Local 167, etc. v. United States, 291 U.S. 293 (1934). And see In re Debs, 158 U.S. 564 (1895) upholding the right of the Federal Government to enjoin a labor organizer from interfering with interstate commerce by inducing employees of the Pullman Company to strike, although obviously the defendant was not himself engaged in interstate commerce. The Court recognized that changes in the economic organization of the nation called for new applications of the power of the Federal Government to regulate interstate commerce; that the Commerce Clause of the Constitution is sufficiently broad to enable the regulatory power of the Federal Government over interstate commerce to keep pace with the ever increasing complexity of such commerce and the interrelationships between intrastate and interstate activities which arise therefrom. As the Court stated at page 591:

> "Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has

> not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to our fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

And finally, the power of Congress to regulate intrastate activities which affect and burden interstate commerce is clearly sustained in U. S. v. Ferger, 250 U. S. 199 (1919) involving the validity of an act of Congress making it a crime to utter counterfeit bills of lading purporting to represent shipments of goods in interstate commerce. The Court said at page 203;

> "Thus both in the pleadings and in the contention as summarized by the court below it is insisted that as there was and could be no commerce in a fraudulent and fictitious bill of lading, therefore the power of Congress to regulate commerce could not embrace such pretended bill. But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce (In re Debs, 158 U.S. 564) and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves." (Underscoring ours)

No clearer statement can be made of the true scope of the power of the Congress under the Commerce Clause than that quoted above.

The test of the constitutionality of a Federal regulation of interstate commerce is not whether the conduct so regulated is interstate commerce, but whether it directly affects interstate commerce. And so here, the fact that the defendant sells no milk in markets other than Indianapolis, or even that it may be that none of the defendant's milk has ever been processed into manufactured dairy products which move in interstate commerce, is immaterial. For the bill of Complaint and the affidavit of E. W. Gaumnitz clearly demonstrate that the prices at which distributors buy milk in the Indianapolis market, whether such milk is there consumed or not, directly affect interstate commerce in manufactured dairy products. Hence the above cases amply sustain the constitutionality of the Agricultural Adjustment Act and the Indianapolis Milk License in its application to the business of the defendant.

The defendant will contend that quite apart from the question of the constitutional power of Congress to regulate intrastate conduct which affects or burdens interstate commerce, it appears from the text of the Agricultural Adjustment Act that Congress was not attempting to exercise that power when, in Section 8 (3) of the Act, it gave the Secretary of Agriculture authority to license processors to engage in the handling of any agricultural commodity or product thereof, or any competing commodity or product thereof, "in the current of interstate or foreign commerce." This contention is founded upon an unduly restricted conception of the meaning of the phrase "in the current of interstate commerce." This phrase was first employed by Justice Holmes in his opinion in Swift & Co. v. U. S. 196 U. S. 375 (1905), in which the validity of an indictment charging the large packers with conspiring to restrain interstate commerce was upheld, although the Court conceded that particular acts of the defendants complained of, were not in themselves interstate in character. The Court stated at page 398:

> "Taking up the latter objections first, commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce."

Congress employed the phrase in enacting the Grain Futures Act and the Packers and Stockyards Act, the constitutionality of which were upheld in Chicago Board of Trade v. Olsen, 262 U.S. 1 (1922) and Stafford v. Wallace, 258 U.S. 495 (1922), respectively. This concept includes acts which are purely intrastate in character and which do not form a necessary step in the actual moving of products in interstate commerce, for the Grain Futures Act regulated contracts to buy and sell grain at a future date, the great majority of which are never executed and are never intended to be executed by delivery of grain. Any recurring course of conduct which directly affects the actual interstate commerce in a commodity or product thereof may properly be said to be within the current of interstate commerce in that commodity. A study of the legislative history of Section 8 (3) of the Act and of a proposed amendment to said Section, pending at the close of the last session of Congress clearly indicates that the words "in the current of interstate or foreign commerce" used in Section 8 (3) of the Act were intended to include any intrastate conduct which directly affects, burdens or obstructs interstate commerce. The proposed amendment would have changed Section 8 (3) so as to make it read that the Secretary of Agriculture shall have authority to license processors handling any agricultural commodity or product thereof "in the current of or in competition with or so as to burden, obstruct or

in any way affect interstate or foreign commerce." The Secretary of Agriculture in appearing before the Senate Committee on Agriculture and Forestry in its hearing on this proposed amendment stated:

> "I believe that, when it originally enacted the Agricultural Adjustment Act, Congress intended to create the powers which are more clearly declared in the proposed amendments. But since these large processors and distributors are now challenging that intention and propose to assert this challenge in Court after Congress has adjourned, it would seem indispensable that Congress now clearly manifest its original purpose beyond the shadow of a doubt." (See Hearings Before the Senate Committee on Agriculture and Forestry, 73d. Congress, Second Session, on Senate Bill #3326, May 8, 1934.)

The report of the Senate Committee on Agriculture to the Senate on this proposed amendment stated, with reference to the paragraph quoted above:

> "It states clearly the implied power the Secretary has under the present license provision to prohibit those who have no licenses, when licenses are required, from engaging in the handling of agricultural commodities so as to affect interstate or foreign commerce." (73d. Congress, Second Session, Senate Report #1120, May 10, 1934)

Thus the proceedings in connection with this proposed amendment clearly indicate the Congress in using the phrase "in the current of interstate commerce" intended to include any act which directly affects, burdens, or obstructs interstate commerce.

Nor can it be contended that the distribution of fluid milk in Indianapolis is not in the current of interstate commerce because such milk undergoes a transformation into butter and other dairy products before it is shipped into states other than Indiana. The Supreme Court has disposed of this contention in Stafford v. Wallace, 258, U.S. 459. The Packers and Stockyards Act there involved used the phrase "in the current of interstate commerce" as applicable to the shipping of livestock to the stockyards, the killing of the animals and their transformation into meat and other animal products, and the reshipment of such animal products to other states. The Supreme Court expressly recognized this use by Congress of the phrase "in the current of interstate commerce" as applicable to the shipment of livestock and the shipment of meat products made therefrom when it said at page 514:

> "The object to be secured by the bill is the free and unburdened flow of livestock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat

> products to the consuming cities of the country in the middle West and East, or, still as livestock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market."

The Chicago Milk License, similar in its terms to the License here involved, has been specifically sustained in its application to purely intrastate distributors by Judge Holly in United States v. Shissler, (D.C.N.D. Ill.) decided April 14, 1934. Judge Holly stated:

> "The power of Congress to regulate intrastate commerce when the situation becomes such by reason of the interblending of the interstate and intrastate operations that adequate regulation of the particular commerce between the states cannot be maintained without imposing requirements with respect to intrastate transactions which substantially affect interstate transactions of like character seems to be well settled. Minnesota Rate Cases, 230 U.S. 352, 431; Houston & Texas Ry. Co. v. United States, 234 U.S. 342; Georgia Public Service Commission v. United States, 283 U.S. 765; State of Alabama v. United States, 283 U.S. 776; United States v. Louisiana, 290 U.S. 70."

We submit that the foregoing discussion demonstrates that all of the milk handled in the Indianapolis Sales Area is in the "current of interstate commerce", and therefore, that the business of the defendant in handling such milk is subject to regulation by the federal government whether or not the defendant is itself actually engaged in interstate commerce.

B. FIXING THE PURCHASE PRICE OF MILK WHICH IS IN THE CURRENT OF INTERSTATE COMMERCE IS A PROPER REGULATION OF INTERSTATE COMMERCE

In the preceding section of this point of the brief it has been demonstrated that all of the milk produced in the Indianapolis Sales Area is in the current of interstate commerce and hence is subject to regulation by the Federal Government under its constitutional power over interstate commerce. It is the purpose of this section to demonstrate that fixing the price to be paid producers of an agricultural commodity which is in the current of interstate commerce is an appropriate mode of regulating interstate commerce under the Commerce clause. The type of regulation employed by Congress in the Agricultural Adjustment Act and the Indianapolis Milk License, issued pursuant thereto, is that of fixing the minimum prices which distributors are required to pay producers for milk purchased from them. The Supreme Court of the United States has squarely held that the Federal Government may exercise its powers to regulate interstate commerce by fixing the price to be paid to producers of an agricultural commodity which moves in the current of interstate commerce.

In Lemke v. Farmers Grain Co., 258 U.S. 50 (1922) the Supreme Court of the United States considered the constitutionality of a statute of the State of North Dakota which regulated the business of purchasing grain from farmers within that state. It appeared that a very large percentage of such grain was shipped in interstate commerce outside of the state after its purchase. The statute in question permitted the purchase of grain only by licensed buyers; required the payment of State charges; provided for a system of grading, inspection and weighing, and further fixed the price to be paid for grain purchased from growers by buyers in the State. The Court held the statute invalid upon the ground that it was an attempt by the State to regulate interstate commerce in derogation of the paramount power of the Federal Government. It was argued in support of the statute that the State merely attempted to regulate commerce in grain, before the interstate journey commenced, and, therefore, while such grain was still in intrastate commerce. In discussing the terms of the statute, the Court stated at page 58:

> "That is, a State Officer may fix and determine the price to be paid for grain which is bought, shipped and sold in interstate commerce. That this is a regulation of interstate commerce is obvious from its mere statement.
>
> "Nor will it do to say that the State law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce. * * *
>
> "It is alleged that such legislation is in the interest of grain growers and essential to protect them from fraudulent purchasers and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under Federal control."

Thus, in holding invalid the North Dakota statute which sought to fix the price farmers were to be paid for their grain, the Court expressly held that such power to fix prices to growers of commodities moving in the current of interstate commerce was specifically delegated to the Federal Government under the Commerce clause of the Constitution.

The power of the Federal Government to fix the price of an agricultural commodity which moves in the current of interstate commerce, thus specifically upheld by the Supreme Court in the Lemke case, is precisely the power which Congress has exercised in the Agricultural Adjustment Act, and which the Secretary of Agriculture has executed in the Indianapolis Milk License with respect to milk sold in the Indianapolis Sales Area.

The doctrine of the Lemke case, that the fixing of the price to be paid for a commodity which moves in the current of interstate commerce is a matter for Federal Regulation under the Commerce clause, was repeated by the Supreme Court with approval in a decision rendered as recently as February, 1934, and applied by it with respect to the fixing of prices of commodities at the end of the interstate journey. In Local 167 I.D.T. etc. v. U. S., 291 U.S. 293, the Court said (Page 297):

> "But we need not decide when interstate commerce ends and that which is intrastate begins. The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce."

In addition to the Lemke and Local 167 cases discussed above, the Supreme Court has recognized in Chicago Board of Trade v. Olsen, 262 U.S. 1 (1922) and in Stafford v. Wallace, 258 U.S. 495 (1922) that the direct causal relationship which obtains between the producers' price of a commodity and its movement in interstate commerce renders the regulation of such price an appropriate exercise of the power of the Federal Government to regulate interstate commerce. Thus in Chicago Board of Trade v. Olson, which sustained the constitutionality of the Federal Grain Futures Act, it clearly appears from the statement of the case that a principal purpose of the Act was to protect growers of grain from the depressing of prices to them by manipulation of futures prices. The Court said, at page 10:

> "The Senate Committee on Agriculture and Forestry reported to the Senate as follows * * * It was shown that a continually fluctuating, and not a stable, market is the desire of speculators. Such a market is against the interests of the producer; he must have stable prices in order to market his crops to best advantage. A market without wide and frequent price fluctuations would greatly benefit the producer." (Underscoring ours.)

And at page 39 the Court states, after referring to United States v. Patton, 226 U.S. 525 (discussed above in this brief):

> "If a corner and the enhancement of prices produced by buying futures directly burden interstate commerce in the article whose price is enhanced, it would seem to follow that manipulations of futures which unduly depress prices of grain in interstate commerce and directly influence consignment in that article are equally direct. The question of price dominates trade between the states. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce of it." (Underscoring ours)

Similarly, in Stafford v. Wallace, 258 U.S. 495, which sustained the constitutionality of an act of Congress regulating the stockyards and commission men and stock dealers operating therein, the Supreme Court, in discussing the purposes of the Act, said, at page 514:

> "The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil which it sought to provide against by the act, was exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of livestock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers on the other. Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer."

We submit, therefore, that the foregoing decisions of the Supreme Court clearly establish that the fixing of prices received by producers of Agricultural commodities which move in the current of interstate commerce is clearly within the commerce power of the Federal Government under the Constitution.

The right of the Secretary of Agriculture to fix producer prices for milk under a similar Milk License issued pursuant to the Agricultural Adjustment Act was specifically upheld by the District Court for the Northern District of Illinois in the case of U.S. v. Shissler, supra. The Court stated:

> "It is indicated by defendants that the Agricultural Adjustment Act is invalid. The defendants say that it is beyond the power of Congress, in the exercise of authority granted to it to regulate Interstate Commerce, to fix the price at which a commodity may be bought or sold. But the power of Congress to regulate Interstate Commerce by Clause 3 of Section 8 of Article One of the Constitution has no limitations other than those that may be found in the Constitution itself. Except as prohibited by some other provisions in the Constitution, Congress has complete and unlimited power. Gibbons v. Ogden, 9 Wheat, 197. McDermott v. Wisconsin, 288 U.S. 115".

Counsel for the defendant will probably refer to the decision of Judge Barnes rendered June 26, 1934, in Edgewater Dairy Co. et al. v. Henry A. Wallace, et al. (D.C. N.D. Ill.) which held the Chicago Milk License unconstitutional on the ground that it is not a regulation of interstate commerce. It is proper to say that an appeal is

now pending from this decision, as is also an application for a writ of supersedeas. The basis of Judge Barnes' decision was his conclusion that the Milk License is a method of regulating the production of milk, and that the production of milk is not interstate commerce. It is the contention of the Government that this construction of the Milk License is entirely erroneous, since its fundamental purpose is not to regulate the production of milk, but is rather to fix the price which producers of milk shall receive for their product. The doctrine of the Lemke case, that the fixing of the price which a producer of a product which moves in the current of interstate commerce shall receive is a proper exercise of the power to regulate interstate commerce, was entirely ignored by Judge Barnes in his decision, and it is submitted that in the light of the Lemke case Judge Barnes' opinion is erroneous. Furthermore, all the obligations and duties created by both the Chicago and the Indianapolis Milk Licenses are imposed upon the distributors, not the producers of milk. Hence, it is the distribution and not the production of milk which these Licenses regulate. It does not follow from the fact that the Licenses directly affect producers in insuring fair prices to them for their milk, that it is a regulation of the production of milk.

Another case to which counsel for the defendant may refer is Hart Coal Corp. v. Sparks, (D.C. W.D. Ky.) 7 Fed. Supp. 16, in which the Court held that a minimum wage provision contained in the Code of Fair Competition for the Bituminous Coal Industry, adopted under the National Industrial Recovery Act, could not constitutionally be binding upon operators of coal mines. An appeal is pending from this decision also, but irrespective of its correctness, it obviously has no application to the case at hand. The basis of the decision was the proposition that the mining of coal is not interstate commerce and hence cannot be regulated under the Federal power over interstate commerce. Practically all of the cases cited in that opinion on this point are those such as U.S. v. E. C. Knight Co., 156 U.S. 1, in which the Supreme Court has stated that the manufacture of an article is not interstate commerce. The right of the Federal Government to fix the price to be received by the producer of an agricultural commodity, as established by the Lemke case, was obviously not involved in the Hart Coal Co. case, consequently that decision and the cases therein cited are clearly not applicable to the case at hand. Furthermore, it may be said that the right of the Federal Government to regulate conditions under which coal is produced has no relation to its right to prescribe the prices which the defendant shall pay producers for milk, for the defendant here is clearly not a manufacturer or producer of an article; it purchases milk from the producers thereof and distributes it.

Opposed to the decision in the Hart Coal Co. case, supra, is Richmond Hosiery Mills v. Camp (D.C. N.D. Ga.) decided May 18, 1934, which, it is submitted, contains the correct interpretation of the power of Congress under the Commerce Clause to regulate donditions of production of an article which directly affect interstate commerce. The case involved the validity of a code of fair competition imposed under the National Industrial Recovery Act upon hosiery manufacturers which provided, among other things, that manufacturing operations should

not be engaged in in excess of eighty hours per week. Thus the provision was clearly a direct regulation of manufacturing. The Court said:

> "It is settled by clear authority that manufacturing alone, within a single state, is not commerce and that the fact that the things manufactured are to be afterwards shipped or used in interstate commerce does not make their production a part thereof.
>
> "It results, therefore, that Section 6 of Article 4 of the hosiery code cannot be sustained as a Federal law under the Commerce Clause of the Constitution, unless it appears that the regulation in question, prohibiting the operation of knitting machines more than two shifts a day, is one regulating transactions 'affecting interstate commerce' in a substantial way."

The Court then discussed in detail the chaotic condition of the hosiery industry resulting from over-production, inadequate wages of labor and unfair competition, which threatened to bankrupt a substantial part of the industry and said:

> "Congress, therefore, had ample evidence before it to justify the exercise of its regulatory powers, even over intrastate processes, for the purpose of removing burdens from and of fostering and promoting interstate commerce, by the authorization of codes like the one contested in this case.
>
> "Where interstate commerce is affected, it is not a question as to whether the affecting cause is a transaction in interstate or intrastate commerce, or an intrastate process, or intrastate understanding or combination, but a question as to whether or not the cause really and substantially affects interstate commerce.
>
> "* * * * The principle, it is submitted, in its broadest outline, is that whatever affects interstate commerce in a substantial and direct way may be regulated by Congress, regardless of whether the affecting cause is a transaction in intrastate commerce or an intrastate process or agreement.
>
> "It would seem, therefore, under the rule above announced that Congress would likewise have the power to regulate manufacture or production when it is shown that the absence of such regulation would restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets or that such regulation would promote and preserve interstate commerce."

C. THE PURPOSE OF THE AGRICULTURAL ADJUSTMENT ACT AND THE INDIANAPOLIS MILK LICENSE IN FIXING THE PRICE TO BE PAID TO FARMERS FOR MILK, IS TO INCREASE THE NATIONAL FLOW OF INTERSTATE COMMERCE.

In the preceding section of this point, we have shown that it is within the power of Congress to fix the price of an agricultural commodity which is in the current of interstate commerce. Under the cases which we there cited, the purpose of Congress in making such regulation is immaterial as far as the question of its power so to do under the Commerce clause is concerned. It would, therefore, be unnecessary for the purpose of our present point to consider the ultimate objective which Congress had in mind in the passage of the Agricultural Adjustment Act. We wish, however, to point out to the Court that not only is the particular regulation (the fixing of prices to producers) contemplated by the Agricultural Adjustment Act and applied in the Indianapolis Milk License an appropriate regulation of interstate commerce, but that the ultimate objective of Congress in adopting this legislation was to remove obstructions to and so increase the national flow of interstate commerce.

There is no need for conjecture as to the condition which Congress decided to remedy by the passage of the Agricultural Adjustment Act or the mechanism which it adopted to remedy that condition. The statute itself answers both questions. It expressly declares that an acute emergency exists throughout the Nation; that a severe and increasing disparity exists between the return the farmers receive for their products and the prices which they must pay for industrial products; that this disparity has broken down and made impossible the orderly exchange of commodities and has burdened and obstructed the normal currents of commerce in such commodities.

In effect, the statute recites that the national flow of interstate commerce has fallen to an alarmingly low level, and declares that it is the purpose of Congress, through the Agricultural Adjustment Act, to secure the farmer an increase in price for his commodities. But, such increased price is secured for the farmer only for those commodities which enter into the current of interstate commerce. Further, Congress, by enacting this legislation, intended to secure for the farmer an increased purchasing power to the end that he in turn, by increasing his purchases, might help increase and restore the national interstate commerce to its normal volume. The purpose of Congress in enacting this legislation was therefore (a) to secure to the farmer a greater return on commodities produced by him which move in the current of interstate commerce, and (b) to increase the national flow of interstate commerce for the benefit of the entire nation.

The condition which faced the nation on May 12, 1933, the date of the passage of the Agricultural Adjustment Act, the predicament of the entire farm population, and the drying up of interstate commerce due in part to the impairment in the purchasing power of the farmer, is graphically and accurately set forth in the Government publication

entitled "The Economic Bases of the Agricultural Adjustment Act" which we shall present to the Court. One of the means adopted by Congress to alleviate this crisis, one of the corner stones of the entire recovery program, was the passage of the Agricultural Adjustment Act, which provided a means for increasing the purchasing power of the farmer and thereby increasing the free flow of interstate commerce. This purpose clearly appears from the fact of the Statute itself. Whether Congress was right or wrong in the economics of its reasoning is beside the point here. See Stafford v. Wallace, cited supra, in which the Court said, at page 521:

> "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This Court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent." (Underscoring ours)

Not only has the fixing of the prices under the Indianapolis Milk License directly benefited the farmer by increasing the price of his product and so increased his purchasing power and the national flow of interstate commerce, but it has corrected marketing conditions prevailing the the dairy industry which, as stated in the affidavit filed by the government, have led to unfair competitive practices on the part of distributors, and serious and continued price wars, resulting in a price for milk lower than that justified by the supply and demand situation existing even during this period of depression. The power of Congress by legislation to correct competitive practices in interstate commerce, which in its opinion are detrimental to the interstate commerce of the nation, has long been recognized by the Court in cases dealing with the Anti-Trust Laws. At the time of the adoption of the Anti-Trust Laws, it was the opinion of Congress that free and unrestricted competition was a wise and wholesome situation for all commerce, and that the national prosperity required that such free competition be maintained. The Courts did not then inquire into the soundness of the economic theory thus adopted by Congress but upheld the Anti-Trust Laws as a proper exercise of the commerce power. Thus in Northern Securities Co. v. U. S. 193 U. S. 197 (1904) the Court said:

> "Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth

> than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare will be best subserved when the national laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be for all, the end of the matter, if this is to remain a government of laws, and not of men." (Underscoring ours.)

As appears from the face of the Agricultural Adjustment Act, Congress has now found that the forces of free competition with respect to agricultural commodities are, if unrestricted, not in the interest of the national prosperity. It has, therefore, in order to promote the national prosperity and the free flow of interstate commerce, enacted the Agricultural Adjustment Act for the purpose, among others, of curbing such competitive practices. The Indianapolis Milk License, by fixing prices to producers eliminates unfair competitive practices among distributors which resulted, under a regime of unrestrained competition, in beating down the price of milk to the producer.

II

THE INDIANAPOLIS MILK LICENSE, WHICH FIXES THE PRICE OF MILK TO BE PAID TO PRODUCERS, IS A REASONABLE AND APPROPRIATE REGULATION OF THE DAIRY INDUSTRY AND DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Under the preceding point of this brief we have shown that the Federal Government has the power under the commerce clause of the Constitution to fix the price which distributors must pay to producers for milk distributed in the Indianapolis Sales Area. It is the contention of the Government that the Indianapolis License is a reasonable and valid regulation of the dairy industry and hence does not violate the due process clause of the Fifth Amendment. In stating our argument on this point, we shall assume, as we have shown above, that the License is a proper exercise of the Federal commerce power.

It should be noted at the outset that where the Supreme Court of the United States has found, in a particular case, that the regulation in question was within the power of the Federal Government to regulate interstate commerce, it has seldom questioned the validity of such regulation under the due process clause of the Fifth Amendment. See Philadelphia B. &. W. R.R.Co. v. Schubert, 224 U.S. 603 (1912): Louisville & Nashville Railroad v. Mottley, 219 U. S. 467 (1911): Calhoun v. Massie, 253 U. S. 170 (1920): New York v. United States, 257 U. S. 591 (1922)

However, assuming that Congress in the exercise of the commerce power is limited in its legislation by the due process clause of the Fifth Amendment 1/, we shall show that the Indianapolis License does not, in any of its provision, violate such due process clause.

More specifically, we shall first indicate the economic facts which confronted Congress at the time of the enactment of the Agricultural Adjustment Act and which made necessary for the protection of the public interest the regulation of agriculture and more specifically of the dairy industry, for the purpose of increasing farm purchasing power. We shall then show that in the light of these circumstances and because of these conditions which Congress so found to exist, the fixing of the price which distributors of milk must pay to milk producers is a proper and valid regulation under the due process clause.

A. AGRICULTURE IN GENERAL AND THE DAIRY INDUSTRY IN PARTICULAR ARE VITALLY AFFECTED, IN THE PRESENT ECONOMIC EMERGENCY, WITH A PUBLIC INTEREST. THE GENERAL WELFARE AND THE PUBLIC INTEREST IN THE DAIRY INDUSTRY JUSTIFY ITS REGULATION BY CONGRESS.

The purpose of Congress in enacting the Agricultural Adjustment Act is evident when the economic condition which confronted this country at the time the Act was passed is considered. At the end of 1928, the major industrial countries of the world found themselves near the peak of an industrial boom which had created a world-wide orgy of speculation in securities and uneven distribution of income. In major branches of industry, saturated markets made further expansion increasingly difficult. There was evidence of weakening in the commodity price structure.

In 1929, the international lending, upon which much of the world's commercial and industrial activity had been reared, was suddenly withdrawn and put to more spectacular uses in the securities market. The cost of credit arose to alarming heights, checking commercial activity. In the summer of 1929 industrial production in the United States began to recede from its peak. Then followed the famous crash in the securities market in October of 1929.

1/ Clearly Congress is not more restricted by the Fifth Amendment than the state legislatures by the Fourteenth. The Supreme Court of the United States frequently cites cases arising under the due process clause of the Fourteenth Amendment, in its decisions upon the due process limitation upon Federal legislation and vice versa. See, for example, Nebbia v. New York 54 Sup. Ct. Rep. 505 (1934) where the Court discusses the due process question under both the Fifth and Fourteenth Amendments as being identical. For this reason some of the cases cited under this point involve the validity of state legislation, but the principles there discussed are equally applicable to legislation by the Federal Government.

A series of heroic efforts to prevent the downward sweep followed the stock market crash. Interest rates were sharply lowered. Industrialists were urged by the President to maintain wage rates. Funds were made available to ex-service men. Open market operations were increased by the Federal Reserve Board. Nevertheless, unemployment continued, consumers' incomes failed, commodity and security prices reached new lows. The national credit structure began to weaken.

In 1930 self-protection induced many countries to erect additional trade tariff barriers and to conserve bank resources, further obstructing free exchange of goods by eliminating normal markets.

In the summer of 1931, in spite of a moratorium on foreign debts, the continuous credit strain brought on a series of central bank crashes in Europe and a flight of capital which eventually forced England to abandon the gold standard in September 1931. In the last of 1931 and the beginning of 1932, gold was exported from the United States in huge quantities.

There followed a wave of bank failures in the United States and a continuing flight of reserves. To counteract the resulting contraction of credit, open market operations were instituted on a greater scale than before. Financial measures were adopted amending the Federal Reserve Act but the downward sweep of the depression continued, bringing apprehension concerning the banking structure. Complete loss of public confidence followed, withdrawals increased at an alarming rate and by March 4, 1933, the entire national banking system collapsed.

Forced by this climax in the national disaster, the United States Government began to formulate the present recovery program. Among many of several Acts passed in quick succession was the Agricultural Adjustment Act, enacted May 12, 1933.

The relationship between the plight of agriculture and the severe economic emergency existing at the time of the passage of the Agricultural Adjustment Act is recognized by Congress in its Declaration of Emergency set forth in the Act. The statute expressly declares than an acute economic emergency exists throughout the nation; that such economic emergency in part is the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of the farmer for industrial products; and that this disparity has broken down the orderly exchange of commodities and has seriously impaired the agricultural assets supporting the national credit structure; and that such conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, rendering imperative the immediate enactment of the Act.

The facts above set forth and the findings made by Congress in the declaration of emergency which is a part of the Agricultural Adjustment Act are matters of common knowledge. The Supreme Court in several cases has taken notice of the existence of the present economic emergency "which dominates contemporary thought."

Atchison, etc. Ry. Co. v. United States, 284 U. S. 284 (1932);

Home Building & Loan Association v. Blaisdell, 290 U. S. 396 (1934);

Nebbia v. New York, 54 Sup. Ct. Rept. 505 (1934)

For a further statement of the economic emergency which confronted the agriculture of the country at the time of the passage of the Act, we call the Court's attention to the Government publication entitled "Economic Bases of the Agricultural Adjustment Act", which we are presenting to the Court herewith and to "Legal Planning for Agriculture", 42 Yale Law Journal 878.

The declaration of emergency contained in the Act is, in effect, a finding by Congress that the welfare of the farmers is so intertwined with the national welfare that it is necessary to increase farm purchasing power in order to remedy the evils of the depression. Following this declaration of emergency, the Act contains a declaration of policy which specifically states that it is the purpose of the Act to increase the purchasing power of the farmer by reestablishing farm prices at a level which will give agricultural commodities a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of such agricultural commodities during the pre-war period, 1909-1914. In other words, Congress has expressly found and stated that one of the necessary remedies for the depression is an increase in farm purchasing power.

The national interest in agriculture is co-extensive with the national interest in the dairy industry. The affidavit of E. W. Gaumnitz which the Government has filed in this case shows that milk is the most important of all farm commodities and that 25% of the total farm income of the United States is derived from dairy products. In addition, the dollar value of dairy products sold in the United States is in excess of that derived from our most important industrial products, steel and automobiles. The production and distribution of milk in the state of Indiana, as well as in the country as a whole, is a paramount industry which largely affects the health and prosperity of the people.

The disastrous effects of the depression upon the dairy industry at large and in Indiana in particular are set forth in full in the Government's affidavit above referred to from which it clearly appears that unless regulatory measures are adopted to assure dairy farmers a fair and reasonable price for their products, a large and important portion of the farm population of the country will be deprived of its livelihood, its purchasing power will be seriously impaired and the health and safety of the people which depend in a large measure upon a constant, pure and adequate supply of fresh milk, will be endangered.

The importance of the dairy industry has further been recognized and is demonstrated by state and local statutes and ordinances affecting the production and distribution of milk. Many states and almost every municipality in the country have passed measures regulating the health and sanitary requirements for the production and distribution of milk. In addition, a number of state legislatures have recently enacted legislation, similar in its purpose to the Agricultural Adjustment Act and

the Indianapolis Milk License, to assure to farmers a fair return for their milk production. (See Legislation in the states of New York, Connecticut, New Jersey, Pennsylvania, Ohio and California.)

The Agricultural Adjustment Act is based upon the vast body of economic research which has been promoted during the last decade by the United States Department of Agriculture and other institutions, in their efforts to familiarize farmers with the underlying supply and demand factors affecting prices. With this body of research before it, Congress passed the Agricultural Adjustment Act. The Passage of the Act was preceded by legislative hearings at which representatives from all interested groups were heard 1/.

By the enactment of the Agricultural Adjustment Act Congress declaredly adopted a specific economic policy: To increase the purchasing power of the American farmer. Under the terms of the Act that policy is to be executed in part through the issuance of licenses, pursuant to Section 8 (3) of the Act. As the Supreme Court of the United States has often held, it is not for the courts to pass upon the wisdom or folly of an economic policy adopted by Congress. The scope of the judicial review of a legislative determination of an economic policy has been most recently stated by the Court in the case of Nebbia v. New York, supra, where Mr. Justice Roberts said:

> "So far as the requirements of due process is concerned and in the absence of other constitutional restriction, a State is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or when it is declared by the legislative arm, to over-ride it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio.****

See also Northern Securities Co. v. United States, 193 U.S., 197, 337 (1904) supra.

1/ See hearings on "Agricultural Emergency Act to Increase Farm Purchasing Power", before the Committee on Agriculture and Forestry, U.S. Senate, 73d Congress, First Session, and H. R. 3835, and hearing on "Agricultural Adjustment Program" before the Committee on Agriculture, House of Representatives, 72d Congress, Second Session. For Congressional debates see Congressional Record, Vol. 77, passim.

B. THE SPECIFIC REGULATION PROVIDED FOR IN THE LICENSE, FIXING THE PRICE OF MILK PURCHASED FROM PRODUCERS TENDS TO EFFECTUATE THE DECLARED POLICY OF THE ACT BY INCREASING FARM PURCHASING POWER. SUCH PRICE FIXING IS NOT A VIOLATION OF THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

We have shown in the preceding section of this point that agriculture as a whole and the dairy industry, its most important subdivision, are vitally affected with a public interest, and that Congress in order to protect and foster such public interest, passed the Agricultural Adjustment Act for the purpose of increasing the purchasing power of the farmer. The fact that the dairy industry is private in its character does not remove it from the realm of regulation by the Government, but the existence of the public interest in such business makes it subject to reasonable regulation in the interest of the public welfare.

In the case of Nebbia v. New York, supra, the Supreme Court of the United States sustained a statute of the State of New York, pursuant to which the price paid to producers for milk and the price at which it was sold to consumers were fixed by the New York Milk Control Board. The regulation of the dairy industry by the State of New York was more complete than the regulation imposed by the Indianapolis Milk License, pursuant to the Agricultural Adjustment Act, since the New York statute fixed the retail price of milk as well as the price to be paid producers, whereas the Indianapolis License fixes only the latter. In discussing the power of the government to regulate a private business as against the due process clause of the Fifth and Fourteenth Amendments, the Supreme Court said;

> "The Fifth Amendment, in the field of Federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guarantee of due process, as has often been held, demands only that the laws shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. * * *. The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community."
>
> See also Noble State Bank v. Haskell, 219 U.S. 104 (1911);
>
> German Alliance Insurance Company v. Lewis, 233 U.S. 389 (1914)

The fact that the Nebbia case upheld the validity of the precise form of regulation of the dairy industry here involved and the exhaustive discussion and the full citations therein, make it unnecessary to cite any additional cases in support of the foregoing principle.

In addition the Supreme Court has decided in a number of cases that the existence of an emergency which seriously threatens the welfare of the community may make reasonable a greater sacrifice of individual liberty than could be exercised within constitutional bounds under ordinary circumstances. In Wilson v. New, 243 U.S. 332 (1917), Congress, faced by the danger of a strike which would have paralyzed the transportation system of the country, enacted a law prescribing hours and wages for employees of interstate carriers. The Court upheld such statute, stating (Page 348):

> "* * *Although an emergency may not call into life a power which has never lived, nevertheless an emergency may afford a reason for the exercise of a living power already enjoyed. If acts which, if done, would interrupt, if not destroy, interstate commerce, may be, by anticipation, legislatively prevented, by the same token the power to regulate may be exercised to guard against the cessation of interstate commerce, threatened by the failure of employers, and employees to agree as to the standard of wages, such standard being an essential prerequisite to the uninterrupted flow of interstate commerce."

See also Block v. Hirsh, 256 U. S. 135 (1921); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921); Levy Leasing Co. v. Siegel, 258 U. S. 242 (1922). So also in Nome Building and Loan Association v. Blaisdell, 290 U. S. 398 (1934), the Court took judicial notice of the state of the country and reaffirmed its willingness to allow the Legislature to broaden its discretion in the face of the community's emergency and the times of economic stress.

Under the foregoing authorities it is clear that the dairy industry is not exempt from regulation in the interest of the public welfare, particularly in the face of the present emergency, and that the sole demand made by the due process clause of the Fifth Amendment is that such regulation shall not be "unreasonable, arbitrary, or capricious and that the means selected shall have a real and substantial relation to the object sought to be obtained."

As we have shown, the object sought to be obtained by Congress, as expressly stated in the Act, is to increase the purchasing power of the farmer. The means selected to obtain that result for the dairy industry in the Indianapolis Area was the issuance of the License pursuant to Section 8 (3) of the Act, fixing the price which distributors must pay to producers for milk purchased. Clearly the means here employed have a direct and immediate relation to the object sought to be obtained.

The right of the Government to fix prices, where price-fixing is necessary for the protection of the public welfare, has been squarely upheld by the Supreme Court of the United States in Nebbia case, supra. We respectfully submit that the decision of the Supreme Court in that case finally disposes of any possible contention that the price-fixing provisions of the Indianapolis Milk License violate the due process

clause of the Fifth Amendment. As we have noted above, the statute of the State of New York involved in the Nebbia case authorized the Milk Control Board to fix the price which distributors were required to pay to producers for milk purchased. The statute further authorized the Board to fix the price at which milk might be re-sold by distributors to consumers. Pursuant to the statute, the Board fixed both producer and re-sale prices. The defendant in the Nebbia case challenged the fixed re-sale price upon the ground that the fixing of prices was beyond the power of the State under the due process amendment. Although the only portion of the New York regulations squarely involved in the Nebbia case was the right to fix re-sale prices, the Court in a sweeping opinion, upheld the entire New York Act and specifically held that price-fixing is a proper regulation where the public welfare requires it. In reaching this conclusion the Supreme Court said:

> "If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatns harm to the producer at the one end of the series and the consumer the other." (Italics ours.)

In the second case arising under the New York Milk Control Act, a three-judge Federal Court sitting in New York specifically upheld the constitutionality of the regulation of the New York Milk Control Board fixing the price to be paid to producers. Heggeman Farms Corporation v. Baldwin et al. 6 F. Supp. 297 (1934). The plaintiff dairy company, in that case alleged that the price fixed by the New York Milk Control Board would compel them to do business at a loss and hence would eliminate him from business. Despite the showing made by the plaintiff in the Heggeman case, the Court upheld the producer price fixed by the Milk Control Board. In answering the contention made by the plaintiffs, the Court (speaking by Judge Learned Hand) said:

> "It must be apparent that such a doctrine will have wide effects. All sorts of regulations may affect the price of materials or machinery necessary to another industry. The elimination of fire hazards may require high rents; they may not be attainable. The observance of sanitary regulations in factories may be expensive; more

> than the market will bear. Conformity with prescribed standards of quality and packing may turn a living profit into a loss. Excise taxes are a part of manufacturing costs; the buyer can not always be made to absorb them and the added load may drive out some producers. Workmen's compensation or a change in employers liability may prove the straw which breaks the camel's back. If the plaintiff be right, in every case the validity of the regulation would depend upon whether the addition to the cost resulted in the elimination of some of the producers. Legislation could scarcely go on at all if its indirect results, its final incidence must be so nicely adjusted. Nor does it follow that it ought to be. Surely, it is a mild assumption that the more vital interest in the end may demand that there should be less goods sold at higher prices rather than that all existing manufacturers should remain in business. He would be a hardy exponent of non-interference who should assert the opposite today; if, for instance, the rise in cost was due to improvements in working conditions, or in the hygienic quality of the product. The purpose served by fixing the price of a raw material may be as imperative as either of these; certainly it is not the function of a court to set the hierarchy of social values. In the past, it is true, there were at times expressions in the books which seemed to say that one kind of governmental purpose would justify interference where another would not. The 'police power' was sometimes spoken of as though it concerned only 'health and safety'. That mode has disappeared; the purpose of the State of New York to preserve its dairy industry may involve remote repercussions as mortal to some individuals, as its purpose to abolish sweatshops; but once it be agreed that the state may interpose for either end in the 'free play of supply and demand,' the incidents follow. It is not critical that some will find themselves unable to withstand the pressure and will collapse."

The constitutionality of the milk license for the Chicago Sales Area issued by the Secretary of Agriculture under the Agricultural Adjustment Act, has been specifically upheld as against the due process objection by the District Court for the Northern District of Illinois, Eastern Division, in the case of U. S. et al v. Shissler et al., supra. The substantive provisions of the Chicago License are substantially the same as those contained in the Indianapolis License in the case at bar. In holding that the Chicago License was valid and reasonable and did not violate the due process clause of the Fifth Amendment, the Court said:

> "The only other provision in the Constitution which in any way limits this power of Congress is the Fifth Amendment which contains the provisions that no person shall be deprived of life, liberty or property without due process of law.
>
> "Does this limitation prevent Congress in the exercise of the power to regulate Interstate Commerce from fixing prices in a period of emergency? This court is not required to search for an answer to this question. The answer has been given by the Supreme Court of the United States in Nebbia v. People of the State of New York, decided March 5, 1934. The Court there held that the statute of the State of New York creating a Milk Control Board with power to fix maximum and minimum prices to be charged by the store to consumers, and the action of the Board in fixing the price of nine cents per quart did not contravene the due process clause of the Fourteenth Amendment. That an emergency does now exist requiring the fixing of the price of milk to the producer is found and declared by Congress in the Act passed May 12, 1933, (46 Stat. 31, U.S.C.A. Tit. 7, Ch. 28) and the court may take judicial notice that the emergency exists."

Judge Barnes' decision in Edgewater Dairy Co. v. Wallace, discussed, supra, did notmention the applicability of the Fifth Amendment to the Chicago Milk License, and hence it is not in conflict with the decisions quoted above.

We respectfully submit that the foregoing decisions conclusively establish the constitutionality of the provision in the Indianapolis License fixing producers' prices for milk purchased. The attention of the Court is respectfully called to the affidavit of E. W. Gaumnitz filed herein, in which the License prices are thoroughly analyzed and from which it appears that such prices (a) tend to achieve the declared policy of the Agricultural Adjustment Act by gradual adjustment of prices toward the parity level as defined in the Act; and (b) were very carefully calculated, having in mind competitive conditions and consumptive demand.

III

A CLEAR CASE IS MADE OUT BY THE BILL FOR A PRELIMINARY INJUNCTION

It is established beyond debate by the sworn bill of complaint that the license of the defendant has been revoked by the order of the Secretary made in accordance with the power conferred upon him by Section 8 (3) of the Act, after a full, fair, administrative hearing in which

the defendant participated and was afforded the fullest opportunity to be heard and present any defenses it had; that the defendant did not deny that it had violated the Milk License in the respects charged in the show cause notice; and that the defendant has ever since the order of revocation and now is operating its business, notwithstanding its license is revoked, in open, notorious, defiant contempt of the United States Government and the Secretary of Agriculture.

Not only is the foregoing established by the bill but obviously, such facts by their very nature, cannot be contradicted by counter-affidavits.

Hence, it cannot be seriously claimed that the bill does not make out a clear case for ultimate relief. Where a clear case is thus made out for ultimate relief by the bill, the court will grant a preliminary injunction where such relief is necessary to avoid disastrous consequences to the plaintiffs, pending the rendition of the final decree.

In Interstate Transit Inc. v. City of Detroit, 46 Fed (2d) 42 (C.C.A. 6th Circ., 1931), in determining the propriety of the issuance of a temporary injunction by the District Court, the court stated:

> "The question presented to the court below involved the substantial nature and debatable character of the plaintiff's claim, and probability of the irreparable injury to the plaintiff, if the status quo were not maintained."

And in Trautwein v. Moreno Mut. Irr. Co., 25 Fed (2d) 374 (C.C.A. 9th Circ., 1927), the court upheld a temporary injunction granted against a water company ordering such company to deliver water to the plaintiff pending the hearing on the permanent injunction, such order specifying the rates pursuant to which the water company should deliver water. In upholding the necessity of issuing a temporary injunction, the court stated:

> "On the present hearing, the courts are only concerned with the single question: Did the plaintiffs make out a prima facie case?"

The equities of the plaintiffs involved in the instant case, as disclosed by the Bill, are as follows:

(a) Unless a preliminary injunction is granted pending the final decree, there will be no way that the United States of America and the Secretary of Agriculture can prevent the defendant from continuing in its business and continuing to violate the terms and conditions of the License, notwithstanding the fact that its license has been revoked.

(b) Unless the Court will, by preliminary injunction, enforce the order of revocation pending the rendition of a final decree, the Indianapolis market will become unstabilized, chaotic, and will collapse; the Administration's entire Indianapolis program under the Indianapolis License

will be at an end; and the declared policy of the Act will be frustrated by the defiant and contemptuous attitude of the defendants.

The only ground for opposing the issuing of a preliminary injunction is the contention of the defendant that the Act of Congress is unconstitutional. In determining the constitutionality of the Agricultural Adjustment Act, the law is well settled that:

(1) The burden of showing the unconstitutionality of the statute is upon the defendants in this case.

Erie R. Co. v. Williams, 233 U. S. 685;
Mountain Timber Co. v. Washington, 243 U. S. 219;
Middleton v. Texas Power Co., 249 U. S. 152.

(2) There is a strong presumption in favor of the constitutionality of this statute.

Erie R. Co. v. Williams, 233 U. S. 685;
Coppage v. Kansas, 236 U. S. p. 1.

(3) The courts will not declare a statute to be unconstitutional unless such unconstitutionality has been established beyond all reasonable doubt.

Adkins v. Childrens Hospital, 261 U. S. 525.

(4) If there was any conceivable state of facts in existence at the time Congress passed the Act, which would render the Act constitutional the courts will presume (a) that such state of facts existed and (b) that Congress knew of the existence of such facts.

Rast v. Van Deman Co., 240 U. S. 342

From the foregoing rules reflecting the attitude of the courts in passing upon questions of the constitutionality of statutes, it clearly appears that the defendant in this case carries a heavy burden, namely, that of convincing this court beyond all reasonable doubt that the statute is unconstitutional. Moreover, it needs no citation of authorities to establish that all of these rules will be rigidly enforced against the attacker of a statute on the ground that it is unconstitutional, upon an application for a preliminary injunction. In other words, where an application for preliminary injunction is attacked upon the ground that a statute is unconstitutional, the Chancellor is most reluctant even to pass upon such question until the final decree.

The Agricultural Adjustment Act, and particularly Section 8 (3) thereof and Licenses issued pursuant thereto, have been upheld in five cases by the Federal lower courts (one Judge decided three of such cases). These five cases are as follows:

Economy Dairy v. Wallace (D.C. Sup. Ct. 1933),
1 U.S. Law Week 9.

Beck v. Wallace (D.C. Sup. Ct. 1933), 1 U.S. Law Week 9.

United States v. Calistan Packers (D.C.N.D. Cal. 1933) I U.S. Law Week 85.

Capital City Milk Producers Assn. v. Wallace (D.C. Sup. Ct. 1933) 1 U.S. Law Week 197

United States v. Shissler, et al. (D.C.N.D. Ill. 1934) Number 13803, decided April 14, 1934.

Compare:
Edgewater Dairy Company et al. v. Henry A. Wallace, et al. (D.C.N.D. Ill., 1934) Number 13878, decided June 26, 1934 (discussed, supra)

Mellwood Dairy v. Sparks (D.C.W.D. Ky.) decided July 2, 1934 (no opinion rendered; appeal pending.)

To deny the preliminary injunction applied for herein inevitably means a collapse of the Indianapolis milk market and a complete ending of the Administration's milk program in Indianapolis. Such a result should be avoided and this court of equity is earnestly urged to render such equitable relief as is prayed for to prevent the destruction of the Administration's program in Indianapolis.

For all the foregoing reasons, we respectfully submit that the preliminary injunction prayed for in the bill of complaint be granted.

Respectfully submitted.

Special Assistant to the Attorney General

United States Attorney

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Of Counsel

In Equity No. 1575

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

THE UNITED STATES OF AMERICA and
HENRY A. WALLACE, Secretary of
Agriculture,

Plaintiff,

vs.

GREENWOOD DAIRY FARMS, INC., a
Corporation,

Defendant.

OPINION OF DISTRICT JUDGE BALTZELL

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

THE UNITED STATES OF AMERICA and HENRY A. WALLACE, Secretary of Agriculture, Plaintiff,	)	
vs.	)	In Equity No. 1575.
GREENWOOD DAIRY FARMS, INC., a Corporation, Defendant.	)	

September 27, 1934.

BALTZELL, District Judge:

This is an action in which the plaintiffs are seeking to enjoin the defendant from selling, marketing, transporting, or in any other manner handling milk or cream for consumption in the "Indianapolis Sales Area", as defined and described in a license theretofore issued. The defendant, in addition to filing an answer to the bill, has also filed a counter-claim in which it is seeking to enjoin the plaintiffs from enforcing or attempting to enforce the terms and provisions of the Act of Congress, known as the "Agricultural Adjustment Act", and the license issued pursuant thereto, as against it. A preliminary injunction is sought by the plaintiffs in their bill of complaint, and by the defendant in its counter-claim. A hearing was had upon the petition of each for a preliminary injunction. Since the hearing, however, the parties have filed a written stipulation, in which it is agreed that the evidence introduced at such hearing may be considered by the court as upon a final hearing, and that the case may be disposed of at this time as upon final hearing, both as to the bill of complaint and as to the counter-claim.

Pursuant to Equity Rule 70½, Special Findings of Fact and Conclusions of Law have been filed in this case, however, a brief statement of such facts is deemed advisable for the purposes of this opinion.

The defendant is a corporation organized and existing under and by virtue of the laws of the State of Indiana, with its principla place of business in Greenwood, a small town in Johnson County, Indiana, which county lies immediately south of, and adjacent to, Marion County, Indiana. Pursuant to Section 8 (3) of what is known as the "Agricultural Adjustment Act", (7 USCA 608) the plaintiff, Henry A. Wallace, as Secretary of Agriculture, (hereinafter referred to as the "Secretary") issued a "License for Milk, Indianapolis Sales Area", effective April 1, 1934.

Such license defined the boundary line of the "Indianapolis Sales Area" as being Marion County, Indiana. By its terms such license applies to all persons engaged in the business of distributing, marketing, or in any manner handling whole milk or cream for ultimate consumption in such Area, who (1) pasteurize, bottle or process milk or cream, (2) distribute milk or cream at wholesale or retail to hotels, restaurants, stores or other establishments for consumption on the premises or for resale or to the consumers, (3) operate stores or other establishments selling milk or cream at retail for consumption off the premises, (4) purchase, market or handle milk or cream for resale in such area. All such persons are designated as distributors. The defendant was classified by the Secretary as a distributor, and was mailed a license authorizing it to distribute milk in the "Indianapolis Sales Area", subject to the terms and conditions contained in such license. The defendant, however, made no application to the Secretary or any other person for a license. A Market Administrator had theretofore been designated by the Secretary, with whom each distributor is required to file a bond. Each distributor is also required to file a report with such Administrator at certain specified times, which report is to contain the names of the individuals from whom the milk is purchased, the quantities purchased from each, the quantities sold by the distributor, the uses to which it is put, etc. The defendant refused to comply with the terms and conditions of the license, especially with those requiring such reports, and refused further to make payment or adjustments, as provided therein. A notice was served upon defendant by the Secretary, requiring it to appear at a designated time and place, and to show cause why its license should not be revoked. A hearing was had by the Secretary on July 19th, 1934, at which hearing the defendant appeared and asserted its position, which is, that it should not be required to comply with the terms and conditions of such license because it is engaged solely in intrastate commerce, and further, if the statute is construed so as to include it, such statute is unconstitutional and void as to it. Afterward, to-wit, on August 2nd, 1934, the Secretary issued an order revoking the license of defendant, effective as of that date. The defendant, however, still asserting that it did not fall within the provisions of such Act, or that if id did fall within the provisions thereof, such Act was unconstitutional, continued to engage in the business of distributing milk within such Area, and is so engaged at this time. The evidence is undisputed that the defendant produces a small amount of the milk distributed by it, and that the remainder of milk, cream, etc., distributed by it is purchased from producers within a radius of five miles of Greenwood, and within either Johnson or Marion County, Indiana. All of the milk, etc. distributed by it is produced within the boundary lines of these two counties, and the defendant purchases such product directly from such producers. It is never outside the boundary lines of such counties. Substantially all of the product produced or purchased by it is distributed in the form of milk or cream in either Marion or Johnson County to the ultimate consumer or to manufacturers who are engaged in the business of the manufacture of butter, cheese or other dairy products. A very small amount remaining is made into cottage cheese by defendant and distributed to consumers in one or both of such counties. There is no evidence that any of the product handled by the defendant is transported from Indiana into another State, even after it leaves its

possession and control. The facts are that all of such product is consumed within the State of Indiana. None of the milk, cream, cottage cheese, etc., handled or distributed by the defendant, is ever outside the State of Indiana. If any dairy products are manufactured from the milk or cream purchased and distributed by the defendant by some person other than it, there is no evidence that any of such manufactured products are shipped or transported to any point, or points, outside the State of Indiana. These, in brief, are the undisputed and uncontradicted facts in this case.

The statute under which the Secretary acted in the issuance of the license in question is Section 8 (3) of what is known as the "Agricultural Adjustment Act", (7USCA 608) and so far as applicable, reads as follows:

> "In order to effectuate the declared policy, the Secretary of Agriculture shall have the power * * *
>
> "To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof."

It is the contention of the plaintiffs that the milk, cream, etc., distributed by the defendant is, within the meaning of this statute, "in the current of interstate * * * commerce * * *" and therefore, that the defendant is subject to the terms and conditions of the license issued by the Secretary. It is further contended that it should not be permitted to operate unless it complies with the provisions of such license. On the other hand, the defendant contends that it is not in any manner engaged in interstate commerce; that the statute in question does not apply to it, and that, therefore, the Secretary has no authority, under such statute, to include it in the license issued by him. It is further contended by the defendant that should such statute be construed so as to give authority to the Secretary to include the defendant under such license, such statute is unconstitutional and void as to it.

The first question, therefore, to be determined is whether or not the statute in question, known as the "Agricultural Adjustment Act", authorizes the Secretary of Agriculture to impose a license upon the defendant under the facts in this case. If it should be determined that the Secretary, under such statute, has such authority, then the court must proceed to determine the constitutionality of such statute. If, however, it is determined that the Secretary has no such authority, under such statute, then it will be unnecessary to proceed further.

It is conceded that the milk, cream, cottage cheese, and all products handled and distributed by the defendant, never leave the State of Indiana from the time of their production until they leave its control. There is no evidence that such products, or any dairy products which may be manufactured therefrom, ever leave the State of Indiana, even after they leave the possession and control of the defendant. The facts are

that such products, or manufactured products, never leave the borders of Marion and Johnson Counties, Indiana, in so far as the evidence discloses, both of which counties are located near the center of the State, and are at least seventy or seventy-five miles from the boundary line of the State in any direction. The "Indianapolis Sales Area", as defined in the license in question, includes the territory within the corporate limits of Indianapolis, and the territory within the boundary lines of the County of Marion, Indiana. The place of business of the defendant is not within such Area, however, it does distribute some of its product therein.

It must first be determined whether or not the defendant, whose business and every transaction by it are entirely intrastate, is included within the statute so as to require it to comply with the terms and conditions of the license in question, in order that it may continue in business. In other words, whether or not, under the statute, the Secretary is authorized to require the defendant to comply with the terms and conditions of such license. It seems clear that the Secretary has authority to require distributors to comply with the terms and conditions of such license only if the product which they handle or distribute is "in the current of interstate or foreign commerce"; provided, of course, such statute is constitutional. Naturally, the first inquiry must be as to the meaning of the term "in the current of interstate * * * commerce," as used in the statute. The plaintiffs contend that milk, cream, dairy products, etc., are naturally transported from one State to another, and that statistics disclose that a large percent of such products produced in any one State are so transported. Thus, it is reasoned that a "current" of commerce is created between the various States in which milk, cream, dairy products, etc., are transported. It is, therefore, logical to conclude, according to the theory of plaintiffs, that all such products handled or distributed by this defendant in the "Indianapolis Sales Area" are "in the current of interstate * * * commerce," as contemplated by the statute, whether such products are, in fact, actually transported outside the State of Indiana or not. This theory is supported by a lengthy affidavit of E. W. Gaumnitz, Economic Adviser to the Dairy Section of the Agricultural Adjustment Administration, which affidavit is filed in this cause and is a part of the evidence upon which the plaintiffs rely. The difficulty with this theory is that the evidence conclusively shows that none of the products handled or distributed by this defendant enters such a "current", if, in fact, such a "current" exists. The statute specifically makes provision for the persons or class of persons who shall be subject to its provisions and who shall be subject to the terms and conditions of any license issued thereunder by the Secretary. It provides that the license so issued shall permit "* * * others to engage in the handling, in the current of interstate* * * commerce, of any agricultural commodity or product thereof." Under this statute, the product or commodity must necessarily come within the provision of the statute at a time when it is under the control of the person sought to be licensed. Otherwise, one would be liable for the acts of some other person, over whom he has absolutely no control. Under the evidence in this case all obligations and liabilities of the defendant ended when it finally disposed of its product, and the course taken by such product during the time it was in the possession and under the control of the defendant determined whether or not it was in interstate commerce in so

far as the defendant is concerned.

A study of this statute leads one to conclude that Congress never intended to enlarge or extend the powers or authority of the person administering such statute so as to enable him to compel those engaged solely in intrastate business to comply therewith. This is especially true, in view of the fact that at the last session of Congress an unsuccessful effort was made to amend such statute so as to apparently enlarge the authority of the Secretary. The Amended Act, Section 8 (3) which failed of passage during such session, reads in part as follows:

> "* * * engaging in the handling of any agricultural commodity or product thereof, or any competing commodity or product thereof, in the current of or in competition with, or so as to burden, obstruct, or in any way affect interstate or foreign commerce."

It seems clear that Congress understood fully the meaning of the statute in question, and that it did not care to undertake to give to the Secretary any broader powers or greater authority than that included in such statute.

It has long been settled that matters purely local in character must be determined by the State. The business of a citizen of a State, which is purely local, must be governed and controlled by such State. However, desirable it may be for the federal government to regulate business, whether local or not, yet such regulation, when it conflicts with the Federal Constitution, can not be maintained. The Supreme Court of the United States has spoken upon this subject many times, no expression of which is clearer or more forceful than that in Hammer v. Dagenhart, 247 U.S. 251; 62 L.E. 1101; 38 S. C. 529:

> "It may be desirable that such laws be uniform, but our Federal Government is one of unumerated powers; 'this principle' declared Chief Justice Marshall in McCullough vs. Maryland, 4 Wheat. 316, 'is universally admitted.'
>
> "A statute must be judged by its natural and reasonable effect. * * * The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution. * * * The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution.
>
> "In interpreting the Constitution, it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. * * * The power of the States to regulate their purely internal affairs by such

> laws as seem wise to the local authority is inherent and has never been surrendered to the general government. * * *"

The language used by the Supreme Court in the case of Heisler vs. Thomas Colliery Co., 260 U.S. 245; 67 L.E. 237; 43 S. C. 83; is significant and is applicable to the instant case, wherein it said:

> "If the possibility, or, indeed, certainty of exportation of a product or article from a State determines it to be in interstate commerce before the commencement of its movement from the State, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the East and its meats, the cotton of the South, the shoes of Massachesetts and the woolen industries of other States, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet on the hoof, wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than those of their production." See also Coe vs. Errol, 116 U. S. 517; 29 L. E. 715; 6 S. C. 475.

In a recent case decided by the District Court for the Northern District of Texas, United States vs. Lieto, et al., 6F. Supp. 32, the court used the following language:

> "Local business, business confined exclusively to a state, business which does not impinge upon, affect, or disturb interstate commerce, is wholly beyond the fingers of the national government. Such business is amenable to the local government."

In the instant case, the business of the defendant is purely local, in no manner connected with interstate commerce, and cannot be affected by the statute in question. The fact that a large percent of the milk, cream and dairy products produced and manufactured within the United States may be transported in interstate commerce does not change or alter the situation in so far as this defendant is concerned. (Heisler vs. Thomas Colliery Co., supra). The fact remains that none of the milk, cream, etc., handled by it enters interstate commerce, or is in the "current" thereof. The word "current" must be given its ordinary meaning, that of "flowing" or "Passing on." The products or commodities handled or distributed never "flowed" or "passed on" beyond Marion and Johnson counties, both in Indiana, and therefore, such products or commodities never entered the "current of interstate * * * commerce", as that term is used in the statute under consideration.

See: Irma Hat Co. vs. Local Retail Code Authority for Chicago, Inc., et al., D.C. N.D. Ill., L Law Week 1033.

United States vs. Mills, D.C. Md., 1 Law Week 1019.

Royal Farm Dairy, Inc. et al. vs. Wallace, et al., D.C., Md., 1 Law Week 949.

Hart Coal Corporation, et al. vs. Sparks, U. S. Attorney, (D.C.) 7F.Supp.16.

Edgewater Dairy Co., Inc. et al., vs. Wallace, Secy. of Agriculture, (D.C.) 7 F. Supp. 121.

It is urged in the brief of plaintiffs that "to deny the preliminary injunction applied for herein inevitably means a collapse of the Indianapolis Milk Market and a complete ending of the Administration's milk program in Indianapolis". The defendant is entitled to the protection afforded it by the Constitution, and certainly the plaintiffs would not have it deprived of that protection, even though the granting to it of such protection might affect a planned program of an administrative body of the government.

The business of the defendant, being entirely intrastate, is in no manner affected by the statute in question, and it is not required to comply therewith. It necessarily follows that the Secretary has no authority, under such statute, to require this defendant to comply with the terms and conditions of the license in question. Having thus determined, it is not necessary to consider the constitutionality of such statute.

The bill of complaint should be dismissed for want of equity, and the prayer of the defendant for an injunction, as set forth in its counterclaim, should be granted.

A decree will be prepared accordingly.